ment for the purpose of making good any loss of tax attributable to the fraud, wilful default or negligence in question."

It is clear from section 91(1) that where assessments were made within twelve years after the expiration of any year of assessment the Director General according to his best judgment can make the assessment. Subsection (3) however says that the Director General where it appears to him that there has been any form of fraud or wilful default or negligence on the part of the taxpayer he may at any time make an assessment in respect of that person for any year of assessment.

In this case the taxpayer raised limitation as a defence and it was necessary for the court to decide whether there was a triable issue. It is settled law that where the taxes become payable under section 103(1) of the Act no defence can be raised in the court that the tax was not payable or was being appealed against or is incorrect. See *Sun Man Tobacco Co. Ltd.* v. *Government of Malaysia.*[2] It is even held in the case of *A. B. C.* v. *The Comptroller of Income Tax, Singapore*[3] that the validity of the notices of assessment and additional assessment is immaterial in determining the objections by the taxpayer. In this case the issues were entirely different to those raised in the ordinary course of events. Here the defendant was resisting leave to sign final judgment for the tax for the period 1953 to 1959 on the ground that they are statute barred. In the case of *Syn Lee & Co. Ltd.* v. *Bank of China,*[4] Thomson C.J. (as he then was) had this to say about leave to sign final judgment under O.14:

"My own view is so well expressed in the words of Bramwell B. in the case of *Lloyd's Banking Co.* v. *Ogle*[5] that I do not find it necessary to go much further than to quote his words:—

'The power to sign judgment was, in my opinion, intended to apply to those cases which almost on the admission of the defendant are undefended, and not to cases in which the defendant might reasonably say, 'I do not know if your case is well founded or not, but I require you to prove it'."

Later on his Lordship repeated that last phrase by saying: —

"Where a guarantor *bona fide* says that he does not know that the debt is due, and that he requires it to be proved, I think the statute was not intended to operate to take that right from him."

Limitation is a good defence plea in law and no court can adjudicate on it without a trial and without having the facts proved. When the plea that a claim is statute barred is raised in court it precludes any question of legality, correctness or rights. All it means is that no claim for the enforcement of that right can be entertained by the courts and no relief can be given by the courts. To give a simple example there may be a lawful debt due by the defendant to the plaintiff but if the claim is made after the period of limitation the court will not grant relief. The question of merits does not arise. In this case the plaintiff relies on section 91(3) for the legality and validity of its assessments but section 91(3) only gives the Director General a right to impose tax for any year of assessment where it appears to him that (a) any form of fraud or wilful default has been committed by or on behalf of any person; or (b) any person has been negligent. As this is a penal law it must be construed strictly and therefore the courts can only pronounce judgment on the claim if the claim is supported by allegations of fraud or wilful default or negligence. It is true that it is not for the Director General to disclose any of these things to the taxpayer when he makes the assessments but if he seeks to obtain judgment of the court the court must be satisfied that there was fraud or wilful default or negligence on the part of the taxpayer before it can decide whether the assessment was barred by limitation. It is essentially a legal issue and it falls outside the scope of section 106(3) which only lays down that the courts shall not entertain any plea for the amount of tax to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103(4) or (5). In this case no such plea is being raised before the court and therefore in strictly construing the section the court should not extend it to mean no plea shall be entertained by the court. Although this may be a tax case as was stated earlier one cannot read more into the Act than what is expressly and unambiguously stated. The taxpayer, the defendant in this case is not precluded from raising the plea that the claim is statute barred and until and unless the court is satisfied that the Director General exercised his powers correctly when making the assessment under section 91(3) the court cannot possibly adjudicate.

For the reasons stated above the appeal will be dismissed with costs and unconditional leave to defend confirmed.

Appeal dismissed.

Solicitors: *Syarikat Atma Singh Gill & Gill.*

LEE KOH ENG v. PUBLIC PROSECUTOR

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Wan Suleiman F.JJ.) December 26, 1974]

[Penang — Federal Court Criminal Appeal No. 18 of 1974]

Criminal Law and Procedure — Trial by jury — Jury returning "divided" verdict — Whether judge can direct jury to reconsider verdict — Jury functus officio — Criminal Procedure Code (S.S. Cap. 21), ss. 219(1) and 225.

In this case the appellant was tried on a charge of murder. After the learned judge had summed up at the end of the trial, the jury retired and subsequently returned and the foreman announced that they found the appellant guilty by a majority of 4 to 3. Thereupon the learned judge directed the jury to retire for another try at an acceptable verdict. They did so and returned with a verdict of guilty of the offence charged by a majority of 5 to 2. The learned judge concurred and convicted the appellant and sentenced him to death. On appeal,

Held: (1) the jury having delivered a verdict of guilty by a majority of 4 to 3 and such verdict having been duly recorded, they were thereafter *functus officio* and could not therefore be directed to reconsider and return a second verdict;

(2) the conviction must therefore be quashed and as the trial itself was a nullity, a trial *de novo* should be ordered.

Procedure recommended at conclusion of trial before the jury.

Cases referred to:-

(1) *R.* v. *Sagar* A.I.R. 1934 Oudh 34.

(2) *Girischandra* v. *R.* A.I.R. 1932 Cal. 118.

(3) *R.* v. *John Parkin* (1824) 168 E.R. 1179.
(4) *Reg.* v. *Vodden* (1853) 6 Cox's C.C. 226.
(5) *Henry Crisp* (1912) 7 Cr. App. R. 173.
(6) *Emperor* v. *Brian Bonham Carter* (1912) 13 Cr.L.J. 815.
(7) *Lyme* v. *Crown* A.I.R. 1924 Lah. 9.

FEDERAL COURT.

Edgar Joseph Jr. (*K. Kumaraendram* with him) for the appellant.

T. Selvanthiranathan (Deputy Public Prosecutor) for the respondent.

Gill C.J. (delivering the judgment of the Court): The appellant was tried and convicted in the High Court at Penang on a charge:

"That you jointly with one Toh Ngoh Lee (since deceased) and two others still at large, on 7th July, 1973 at about 12.20 p.m. at the Mercantile Bank, No. 11 Beach Street, Georgetown, in the District of Georgetown, in the State of Penang, committed murder by causing the death of one Jan Mohamed s/o Noor Mohamed and you thereby committed an offence punishable under section 302 of the Penal Code, Cap. 45".

The evidence connecting the appellant with the alleged offence was almost entirely circumstantial. The defence was a denial and an alibi.

After the learned judge had summed up at the end of the trial, the jury retired at 12.30 p.m. to consider their verdict. They returned into court at 3.00 p.m. and the foreman announced that they found the appellant guilty by a majority of 4 to 3. Thereupon the learned judge directed the jury to retire for another try at an acceptable verdict. They did and came back at 3.45 p.m. with a verdict of guilty of the offence as charged by a majority of 5 to 2. The trial judge concurred, convicted the appellant and sentenced him to death.

The appellant appealed to this court against both conviction and sentence. Various grounds were set out in the Petition and Supplementary Petition of Appeal but we were of the view that there was both merit and substance in the ground that the jury having delivered a verdict of guilty by a majority of 4 to 3, and such verdict having been duly recorded, they were thereafter *functus officio* and could not therefore be directed to reconsider and return a second verdict. As requested counsel confined their arguments to this ground.

The question therefore was whether after their "divided" verdict, it was competent for the judge to ask them to retire for another try at an acceptable verdict. The Criminal Procedure Code (S.S. Cap. 21) contains no provision empowering the judge to direct a jury to retire and reconsider a verdict except as provided in section 219(1) and presumably in section 225 which we now reproduce:

"219(1) If the jury are not unanimous, the judge may require them to retire for further consideration.

225. If the jury are unable to agree upon the verdict, the judge, *after such period as he considers reasonable*, may discharge the jury."

There is no doubt that there is power to amend or rectify a verdict attributable to accident or mistake. There is authority that where a verdict is not clear and definite, it is not wrong to send the case back again to the jurors for a clear verdict according to law (*R.* v. *Sagar*[1]).

A confused verdict given under a misconception as regards the number and names of the accused would apparently not render illegal a second verdict after reconsideration after the trial judge has given them a fresh direction (*Girishchandra* v. *R.*[2]).

R. v. *John Parkin*[3] was cited to us for the proposition that though a verdict is recorded, yet if it appear promptly that it is not according to the intention of the jury, it may be vacated and set right. In *Reg.* v. *Vodden*,[4] upon the trial of an indictment, one of the jurors by mistake delivered a verdict of "not guilty", which was heard and taken down by the chairman and the clerk of the peace. The prisoner was discharged out of the dock, but other jurymen immediately called attention to the mistake, and the prisoner was brought back. It was held that the right verdict might then be taken. In *Henry Crisp*[5] it was held that if there is any ambiguity in the expression of a verdict, the judge is entitled to ask the jury to reconsider it, and if they do so their ultimate finding is to be recorded.

The position, as in this case, where no question of accident, mistake or ambiquity arises, is quite different (see *Emperor* v. *Brian Bonham Carter*[6]). In *Lyme* v. *Crown*[7] Fforde J. said:

"All the evidence on both sides must be concluded before the case can be submitted to the jury. There is no power in a judge to present a case to a jury subject to conditions, and once a verdict is delivered there is no power in the trial court or in the jury to reconsider that verdict except under the provisions of section 304 of the Code of Criminal Procedure which provides that where a wrong verdict is delivered by accident or mistake, the jury may amend it before or immediately after it is recorded. With this exception the jury is *functus officio* as soon as its verdict is announced to the court.... The second verdict upon which judgment has been given and sentence pronounced is a nullity and the judgment based upon it is, therefore, made without jurisdiction and is void. For this reason alone the finding and sentence must be set aside."

Section 304 of the Indian Code of Criminal Procedure is in *pari materia* with section 224 of our S.S. Code, which reads:

"224. When by accident or mistake a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict and it shall stand as ultimately amended."

Section 218 of the Code provides that the foreman shall inform the judge of their verdict or the verdict of the majority. Sections 220, 221 and 222 stipulates what a judge may do where a verdict is either unanimous or by a majority of not less than five to two. These provisions appear to indicate that unless there is unanimity or the requisite majority, it would be for the judge to treat it as "if the jury are unable to agree" and "discharge the jury." A verdict given pursuant to section 219(2) could well be a verdict not in accordance with the foregoing provisions and would therefore be, as in the instant case, a nullity, resulting in the same consequence as in section 222 and 225 of a fresh trial before another jury (see section 226).

We were satisfied upon the authorities that the verdict upon which the appellant was convicted and

sentenced to death was a nullity. We therefore quashed the conviction and set aside the sentence. As the trial itself was also a nullity we ordered a trial *de novo*.

We think to avoid a recurrence of this technicality, it would be desirable to recommend procedure at the conclusion of a trial before the jury. On their return after retirement to consider their verdict, the following questions should be put:

1. Gentlemen, have you reached a verdict? Please answer "Yes" or "No".

   If the answer is "No", the jury should be asked to retire to reconsider and arrive at a verdict, failing which a fresh trial pursuant to section 225 will follow involving both time and expense.

2. If the answer is "Yes", Is your verdict unanimous or by a majority? Please answer without stating what the verdict is.

3. If the verdict is unanimous, what is your verdict? Please only answer "Guilty" or "Not Guilty."

4. If the verdict is by a majority, what is the majority? Please only answer without stating the verdict.

5. If the verdict is by a majority of 6 to 1 or 5 to 2. What is your verdict? Please only answer "Guilty" or "Not Guilty."

   If the verdict is by a majority of 4 to 3 and the judge decides to ask them to retire to reconsider and arrive at a majority verdict of not less than 5 to 2 one way or the other, the jury should not be asked to state their verdict. If they are asked to state what their verdict is and they proceed to do so, the judge has no option but to order a trial before another jury.

Trial de novo ordered.

Solicitors: *Kumar, Chan & Chia.*

LEE KEE CHOONG v. EMPAT NOMBOR EKOR (N.S.) SDN. BHD. & ORS.

[F.C. (Gill C.J. (Malaya), Ali and Ong Hock Sim F.JJ.) January 8, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 37 of 1974]

Companies — Shares — Value of — Assessment by independent accountants — Whether assessment can be challenged.

In this case by a consent order, it was ordered that all the shares of the appellant and his brother be purchased by all or any of the respondent at a fair and just price to be assessed by a firm of accountants to be approved by the court. On the application of the appellant Messrs. Price Waterhouse were appointed to assess the shares. Subsequently the appellant made an application that the valuation of Messrs. Price Waterhouse be rejected. The learned trial judge dismissed the application and the appellant appealed.

Held, dismissing the appeal: in the circumstances of this case there was no justification to go behind the valuation report or allow any further inquiries to be made as to the correctness or otherwise of the valuation.

Cases referred to:-

(1) *Frank H. Wright (Construction) Ltd.* v. *Freedoor Ltd.* [1967] 1 W.L.R. 506.

(2) *Collier* v. *Mason* (1858) 25 Bear. 200; 53 E.R. 613, 614.

(3) *Weeks* v. *Gallard* (1869) 21 L.T. 655.

(4) *Dean* v. *Prince* [1954] 1 All E.R. 749.

(5) *Dean* v. *Prince* [1953] 2 All E.R. 636.

(6) *Smith* v. *Gale* [1974] 1 W.L.R. 9.

(7) *Jones (M.)* v. *Jones R.R.* [1971] 1 W.L.R. 840.

FEDERAL COURT.

V. K. Palasuntharam (*R. R. Sethu* with him) for the appellant.

S. Y. Chan for the respondents.

Gill C.J. (delivering the judgment of the Court): On a Companies Winding-up petition to the High Court at Kuala Lumpur by the appellant to this appeal, Mohamed Azmi J. made a consent order on 5th July 1973 that all the shares of the appellant and his brother Lee Kee Min in Empat Nombor Ekor (Negri Sembilan) Sendirian Berhad, the first respondent company, be purchased by any or all of the remaining contributories of the company, who are the other respondents to this appeal, at a fair and just price to be assessed by a firm of independent accountants to be approved by the court.

Following the consent order there was correspondence between the solicitors of the parties regarding the appointment of a firm of independent accountants. The appellant's solicitors wrote to suggest the appointment of Messrs. Price Waterhouse & Co. This was not acceptable to the respondents' solicitors who first wrote to suggest the appointment of Messrs. Peat, Marwick, Mitchell & Co. and later the appointment of Messrs. Tan Kim Leong & Co. The appellant's solicitors did not agree.

On 6th August 1973 the appellant made an application to the court by way of summons in chambers for the appointment of Price Waterhouse. In his affidavit in support of the application, he referred to the correspondence which had passed between the solicitors for the parties and went on to say that as Price Waterhouse were completely unknown to all parties concerned and were chartered accountants of long experience and standing, they were a suitable firm to be appointed and had in fact agreed to act if all parties agreed to their appointment. He further said that Tan Kim Leong was known to him and was one of those who had in the beginning negotiated with Mr. Lim Chooi Seng, the third respondent, for the Seremban agencies and failed. In opposing the appellant's application one Chew Him Fah filed an affidavit on behalf of the respondents to say that the opposing contributories were unable to see any reasonable objection to the appointment of Peat, Marwick & Mitchell as independent valuers.

In the event, Mohamed Azmi J. made an order appointing Messrs. Price Waterhouse & Co. and he made a further order that they be at liberty to have access to all bills, papers, vouchers, accounts and other documents of the company which they considered relevant for the purpose of carrying out the valuation of the shares.

By a letter dated 1st December 1973 Price Waterhouse & Co. informed the appellant's solicitors that they valued the shares of the appellant and of his brother in the first respondent company at $184/- per share. Thereafter the appellant's solicitors had an